

CHAPTER 7

A-E RESPONSIBILITY MANAGEMENT PROGRAM

7-1. Introduction. This chapter addresses actions to be taken from the discovery of an A-E error or deficiency to the issuance of a final contracting officer's decision (COD) against the A-E firm under FAR 52.233-1, the contract "Disputes" clause. Subsequent action is covered by FAR 33.2, Disputes and Appeals.

7-2. Principles.

a. An A-E firm is responsible for the quality of its products and services and is liable for damages to the Government caused by its negligence or breach of contractual duty. The A-E Responsibility Management Program (AERMP) is a formal process for holding A-E firms accountable for their work and recovering damages to the Government caused by A-E firms.

b. The goals of the AERMP are to:

(1) Maintain and improve the quality of A-E services and products.

(2) Hold A-E firms responsible for their work and recover damages to the Government resulting from negligence or breach of contractual duty.

c. The AERMP will be conducted in a fair, consistent, and reasonable manner.

d. No demand for recovery of damages will be made to an A-E firm without an adequate review of the facts and circumstances.

e. Investigations and recovery actions will be pursued in a cost-effective and timely manner to mitigate damages, minimize administrative costs, strengthen the likelihood for full recovery, and allow the reuse of project funds.

f. Recovery of damages will only be pursued when economically justified or otherwise in the best interest of the Government.

g. A reasonable effort will be made to resolve liability actions through partnering and negotiation. If unsuccessful, other alternative dispute resolution (ADR) techniques should be considered. Litigation should be the last option.

h. Only the KO can accept a liability settlement for the Government or relieve an A-E firm of its liability.

7-3. Responsibilities.

a. MSC. MSC commanders are responsible for overseeing the AERMP in their subordinate districts to ensure timeliness, cost-effectiveness, and compliance with this

pamphlet. MSC Commanders will appoint an MSC AERC. The AERC will provide day-to-day oversight of the AERMP, and be the point of contact with the districts and HQUSACE.

b. Operating Commands¹.

(1) A-E Responsibility Administrator (AERA). The Chief, or Assistant Chief, of Engineering (or comparable position) will be the AERA. The AERA is responsible for the timeliness, cost-effectiveness, reasonableness and fairness of the AERMP, and compliance with this pamphlet. The AERA will appoint a command AERC. The AERC will be a very experienced engineer or architect who has the training specified in paragraph 4-4.b of this pamphlet. The AERC will be responsible for the day-to-day management of the AERMP and be the point of contact for the program.

(2) A-E Responsibility Management Review Board (AERRB). The commander of each operating command will establish an AERRB to review deficiencies in A-E performance when requested by the AERC or the KO and advise on appropriate action. The AERA shall chair the AERRB and the voting members will include senior representatives from Construction, Programs and Project Management, Contracting and Counsel.

c. Multiple Responsible USACE Commands. When the project management, design and/or construction of a project are performed by different USACE commands, the USACE command having KO authority for the A-E contract ("design" command) will be responsible for the AERMP, including reporting. The "design" command is responsible for developing a memorandum of understanding with the "project management" and/or "construction" commands on how the requirements of this chapter will be met.

7-4. Legal and Regulatory Background.

a. All FP contracts and ID contracts with FP task orders for A-E services must incorporate FAR clause 52.236-23, "Responsibility of the Architect-Engineer Contractor," which stipulates that:

(1) The A-E firm shall be responsible for the professional quality, technical accuracy, and coordination of all designs, specifications, and other services it furnishes.

(2) The A-E firm shall, without additional compensation, correct or revise any errors or deficiencies in its work.

(3) The Government's review, approval or acceptance of the A-E services is not a waiver of any of the Government's rights.

(4) The A-E firm shall be and remain liable for all damages to the Government caused by its negligent performance.

¹ See definition in paragraph 2-2.a.

b. Typical examples of A-E liability are when, due to an A-E design error or deficiency, modification of an ongoing construction contract is required or there is a design-related failure after construction. An A-E firm may also be liable for Government damages arising from failure to design within the funding limitations (FAR 36.609-1 and 52.236-22) or to comply with the contract schedule or technical provisions. In all such instances, FAR 36.608 directs the KO to “consider the extent to which the architect-engineer contractor may be reasonably liable,” and to “enforce the liability and collect the amount due, if the recoverable cost will exceed the administrative cost involved or is otherwise in the Government’s interest.”

c. Each of the following three questions must be answered affirmatively for an A-E firm to be liable for damages:

(1) Did the firm make an error or omission?

(2) Did the error or omission result from the firm's negligence, or from a breach of contractual duty?

(3) Has the Government suffered damages as a result of the error or omission?

d. The following legal principles should be considered when deciding if an A-E firm is liable:

(1) Negligence. Negligence is the failure to meet the standard of reasonable care, skill and diligence that one in the A-E profession would ordinarily exercise under similar circumstances.

(2) Burden of Proof. In order for the Government to prevail in a claim against an A-E firm, it must be able to prove that the firm was negligent and that the error or omission by the A-E firm was the cause of the damages.

(3) Comparative Negligence. The doctrine of comparative negligence provides that the Government is not barred from any recovery of damages if it is also negligent, but that there will be an apportionment of damages or responsibility in proportion to the relative fault of the parties involved.

(4) Mitigation. The Government has a responsibility for minimizing damages resulting from an A-E firm's deficiencies. The firm must be notified promptly when a deficiency is discovered by the Government and provided a reasonable opportunity to correct its work.

(5) Government Assumption of Risk. An A-E firm may be relieved of responsibility for a design deficiency due to action by the Government, such as if the Government corrects the design deficiency without the concurrence of the A-E firm and the corrected design is the cause of a failure.

e. The Government is entitled to seek recovery of damages resulting from any type of negligence, non-performance, or breach of contract terms. It is not necessary that the deficiency be corrected for the Government to recover damages. It is only necessary to show that the Government has incurred damages, or will in the future (diminished value theory).

f. FAR 36.608 allows economic factors to be considered when deciding whether to initiate an A-E liability case. However, it may be in the Government's interest to initiate a case where the administrative costs could exceed the anticipated recovery, such as a small claim arising from a serious error that could have resulted in much larger monetary damages or personal injury. All the circumstances of each case must be considered when deciding whether to pursue A-E liability.

g. It is possible to be overly zealous in the pursuit of A-E liability. It is not in the Government's best interest to make claims for relatively small damages due to minor errors that would probably not support a claim of negligence before a board or court. This could lead to the A-E community regarding such claims as a cost of doing business with USACE, with attendant increases in price proposals, diminution of the Corps' professional image, and fewer firms willing to work for USACE.

7-5. Implementation.

a. Command Implementation. Each USACE command will issue written procedures implementing the AERMP in the command.

b. Installation Support. The USACE KO retains responsibility for certain aspects of the administration of A-E contracts awarded for use by Army installations, including the investigation and enforcement of liability and resolution of contract disputes. In accordance with paragraph 5-6.d, the USACE KO will provide written instructions to the installation regarding the AERMP, including notification of the A-E firm, obtaining a corrective design, funding, and preparation of damage statements and findings-of-fact.

c. Program Cost Effectiveness. The AERA will periodically review the cost-effectiveness of liability investigations and recovery actions to ensure that the technical and administrative effort is commensurate with the damages recovered. In particular, the AERA will review the Efficiency Ratio and Settlement Ratio, as defined and reported on ENG Form 4858A-R (see paragraph 7-9.b(1)), for each liability case.

d. Schedule. A-E liability cases must be pursued in a timely manner to mitigate the damages and strengthen the likelihood for full recovery. Also, since recoveries can be credited to the project if the appropriation is open, quick action is highly desirable if the damages are significant. The AERC will establish an appropriate schedule for each case (depending on dollar value, complexity, and other pertinent considerations), closely track the Government and A-E firm's actions, and follow-up with the appropriate parties when suspense dates are not met. The AERA will periodically review liability cases to ensure their

timely progress.

7-6. Funding.

a. The AERMP is a team effort. While Engineering Division is the lead in administration of this program, the PM, Contracting, Counsel, Construction Division, Resource Management (RM) and other team members must be continually involved. The PM will be kept apprised of A-E liability actions so the PM may control, allocate and/or obtain funds and keep the customer informed. Also, the AERC will coordinate with the PM and RM to keep the project account open until all A-E liability actions are resolved. This will facilitate funding of the costs to pursue recovery of damages, as well as allow crediting the appropriate account(s) with monies received in settlements.

b. The AERC will request that the PM take appropriate action to ensure that detailed project cost records are maintained for each A-E liability case, starting when it is apparent that a liability case will be initiated. These cost records must include all costs associated with investigation, deliberation and prosecution of the case, including support costs incurred by the Office Counsel such as for travel, expert witnesses, and deposition expenses. (Office of Counsel labor costs are funded as general and administrative overhead.)

c. General administration of the AERMP, such as AERRB meetings and reporting, will be funded by the respective departmental overhead accounts of the personnel involved.

d. Planning and design (P&D) funds for military construction (MILCON) projects, and appropriate project funds² for other types of projects, will be used to investigate and pursue A-E liability actions that occur during planning or design.

e. For a project under construction, the initial investigation and documentation of A-E liability and damages by Construction Division will be charged to the Supervision & Administration (S&A) account. Thereafter, project contingency funds will be used to investigate and pursue A-E liability. For MILCON projects, P&D funds can also be used³.

f. During the design or construction of a project, the AERC will request additional project funds from the PM when necessary to investigate or pursue A-E liability. The request will give an explanation of the design deficiencies and damages, breakdown of estimated

² Project funds mean the appropriation that funded the project, or succeeding appropriations in the rare case the appropriation ceases to be funded and the activity is funded from a different appropriations.

³ P&D funds for A-E liability action on MILCON projects must be requested from HQUSACE, ATTN: CEMP-M, on a case-by-case basis. The request must include the amount of P&D funds required, an updated ENG Form 4858A-R (Quarterly A-E Liability Case Report), and a discussion of the likelihood and estimated amount of recovery. CEMP-M will make a risk assessment in evaluating the funds request.

costs, discussion of likelihood of recovery and expected amount of recovery.

g. The PM will request additional funds from the customer, if warranted. The decision to request and expend project funds to pursue A-E liability will consider the amount of the damages, the likelihood of recovery, whether the settlement will be received in time to benefit the customer's project or program (see paragraph 7-7.n and Appendix DD, paragraph 3), and the customer's willingness to provide the funding. Where project funds are no longer available, the respective departmental or general and administrative overhead accounts of the personnel involved may be used to investigate and pursue A-E liability. Only the KO can finally decide not to pursue A-E liability (FAR 36.608) due to funding constraints.

7-7. Notification, Investigation and Recovery Procedures. Appendix BB is a graphic depiction of the A-E liability process. Each step is discussed below.

a. Notification and Corrective Design.

(1) The A-E firm will be promptly notified⁴ as soon as a design deficiency is discovered, requested to provide a corrective design,⁵ and informed that it may be financially liable. Initial notification should be made by telephone immediately and formal notification will be made soon after by letter. The AE/RE will also immediately coordinate directly with the Engineering Division and the PM on significant design deficiencies discovered during construction. All contacts with an A-E firm will be fully documented.

(2) Engineering Division will review the corrective design when appropriate, such as when significant structural or life safety features are involved. The Engineering Division review will be performed promptly to avoid or minimize construction contract delays.

b. Corrective Design by the Government. If the A-E firm is unresponsive or cannot furnish a corrective design within an acceptable time period, the Government may have to provide the redesign. (See ER 1110-1-8152 regarding documenting design changes.) If so, the firm will be formally notified of its liability for the redesign cost and be kept informed of the Government actions. The firm should be requested to concur in the corrective action taken by the Government or should sign a release. A statement shall be prepared for the contract file in accordance with FAR 36.609-2 if no action is taken against an A-E firm to recover redesign costs.

c. Implementation of Corrective Construction. An A-E firm shall not be permitted to perform construction required to correct design deficiencies by any means, including the use

⁴ Notification will be made by a person identified in the A-E contract, such as the AE/RE, COR or PM.

⁵ There are instances where obtaining a corrective design from an A-E firm may not be necessary, such as when the correction is obvious and simple or the damages are minimal. But see paragraph 7-4.d(4) regarding the Government assumption of risk. In such cases, notification is not required, however the A-E firm must still receive an information copy of the construction contract modification.

of its or the Government's contractors. If done, the Government is not in control of the work and can not ensure that the Government's requirements and interests are satisfied. The Government may invite the A-E firm, as an advisor, to attend negotiations with the construction contractor on changes due to A-E design deficiencies.

d. Documentation of Deficiency. The discovery of a design deficiency and the early actions taken by the Government will be promptly and adequately documented. Include a thorough description of the deficiency, record of contacts with the A-E firm and its responses, the persons involved, actions taken, potential witnesses, and photographs, when appropriate. The AE/RE will evaluate each design error or deficiency using the conditions in paragraph 7-4.c, determine if the firm is not liable or is potentially liable, and document the contract file accordingly. The AE/RE will forward all potential instances of A-E liability to the AERC for further investigation.

e. Determination of Damages. If an A-E firm is potentially liable for a design error or deficiency, the AE/RE will compute the initial estimate of damages. Damages are the additional costs that the Government has incurred, or will incur in the future, due to an A-E firm's design errors or performance deficiencies. Appendix CC provides detailed guidance on determining damages. The damages will be revised as needed.

f. Investigation of Liability. The AERC will coordinate the investigation of potential instances of A-E liability. The investigation will be conducted by qualified design professionals of the appropriate disciplines who are familiar with the scope of the A-E contract. These persons must be capable of serving as credible Government experts if a liability case is eventually litigated. The investigation will be documented in a findings-of-fact that will:

(1) Explicitly define the errors or omissions by the A-E firm, including specific references to drawings, specifications, design criteria, review comments, and other pertinent documents.

(2) List the applicable contract provisions and any subsequent direction or guidance that might bear on the question of responsibility.

(3) Give an opinion on the A-E firm's responsibility and negligence. If the investigation concludes that the A-E firm is not liable for damages, the AERC will document the findings-of-fact accordingly and forward to the AERRB for concurrence. The findings-of-fact will be included in the contract file.

g. Preparation of Case Document. If the investigation concludes that an A-E firm is liable (but see paragraph 7-7.j for small actions), the AERC will prepare a case document to include:

- (1) Project background and schedule.
- (2) Computation of damages.

- (3) Findings-of-fact on liability.
- (4) Summary of any other liability actions on the same contract.
- (5) A-E performance evaluation history, including the contract under review.
- (6) Statement on the support and cooperation which the A-E firm provided during construction.
- (7) Any comments or information provided by the A-E firm regarding its liability.
- (8) Recommended action.

h. Letter of Intent. After the case document is prepared, the AERC will send a letter to the A-E firm (with a copy to the PM and the design COR) indicating the AERC's intent to recommend formal review by the AERRB of the firm's liability for damages. The letter will include any documents supporting the Government's position and a detailed statement of damages. The firm will be invited to present information on its position and to negotiate a settlement. A liability case is initiated when the letter of intent is sent⁶. Interest is not assessable until, and if, a demand letter is issued by the KO. In some instances it may be appropriate to issue a demand letter at this stage (see paragraph 7-7.1(3)).

i. Negotiation by AERC. The AERC may directly negotiate a liability settlement with an A-E firm without first presenting the case to the AERRB and without the KO issuing a demand letter, if the AERC has been previously authorized to do so by the KO⁷. The AERC will then present the case and proposed settlement to the KO for approval, and to Counsel and any other appropriate offices (which may include the AERRB) for concurrence. The settlement will be reported in accordance with paragraph 7-9. If negotiation is unsuccessful, the AERC will present the case to the AERRB.

j. Small Errors or Deficiencies. If there are no compelling non-economic reasons, the consideration of small errors or deficiencies (typically below \$2,500 - \$5,000, depending on the size of the contract) may be deferred until the total number and/or total damages warrants recovery. The AERC will periodically review the deferred liability actions on each contract to see if aggregate recovery is warranted, and document these reviews. Any errors or deficiencies still held at the end of a construction contract that do not warrant recovery will be presented collectively to the KO for approval not to pursue, with the concurrence of any other appropriate offices. The decision not to pursue will be documented in the contract file as required by FAR 36.608.

⁶ If an A-E settlement is made without the need for a letter of intent, a case report will still be prepared and the amount of the settlement included in the annual AERMP report. See paragraph 7-7 for reporting requirements.

⁷ The KO may assign a contract specialist to the negotiation team with the AERC.

k. AERRB Review and KO Action. The AERRB will promptly review the cases referred to it by the AERC and recommend action to the KO. The KO will then decide whether to issue a demand letter or not pursue recovery. The case document will be placed in the A-E contract file, along with the minutes of the AERRB meeting and the KO's decision.

l. Demand Letter.

(1) The demand letter is an informal Government claim against the A-E firm. It notifies the A-E firm of the claim and provides an opportunity for resolution of the matter without resorting to the "Disputes" clause. The demand letter is prepared by the Office of Counsel, with factual and technical input from the Engineering and Construction Divisions and the PM, and shall be signed by the KO.

(2) The demand letter shall include the charge of negligence or contract breach, with the supporting documentation, a detailed listing of the damages, and the A-E firm's options. The letter shall state that interest charges will accrue on the damages if the claim is not settled within 30 days (FAR 32.614-1), and that the damages will be adjusted for costs incurred by the Government subsequent to the demand letter. The letter shall also state that a COD will be issued if satisfactory progress towards resolution is not made within a specified period of time (typically 30-60 days).

(3) Consider when the demand letter should be issued on a case-by-case basis. For example, if the A-E liability is obvious and the damages are significant, a demand letter should be sent as soon as the AERC prepares the case document instead of sending a letter of intent. The interest clause in the contract (FAR 52.232-17) allows for interest from the date of the first written demand by the KO. (See Hazen & Sawyer, Inc., 85-1 BCA 17,919, which established the right of the Government to interest on recoveries under the A-E Responsibility clause. Also see 94-2 BCA 26,631, and 94-3 BCA 26,992.)

m. Negotiation and COD.

(1) A reasonable effort will be made to resolve a liability case by negotiation. If negotiation is not successful, consider using other ADR techniques⁸. If a firm does not respond to a demand letter in a reasonable length of time, the firm should be contacted and encouraged to either take issue with the Government's charges or enter into negotiations.

(2) If the firm still does not respond, a COD will be issued without delay. The COD starts a defined process under the "Disputes" clause. (See EFARS Appendix A, Part 3, A3-203.) The firm must either concede the case or appeal to the appropriate board of contract appeals within 90 days or the Court of Federal Claims within one year. The COD formally

⁸ ADR is a range of techniques for the efficient and effective management of disputes without litigation. See FAR 33.214. The techniques include collaborative problem solving, mediation, facilitation, and third party intervention. ADR can be very useful in resolution of disputes before issuance of a COD, as well as afterwards.

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notifies the A-E firm that the Government is making a claim for the reasons stated, gives a detailed statement of damages, and lists the firm's options. The Debt Collection Act of 1982 applies to a claim against an A-E firm when a COD is issued. See Appendix DD for applicable procedures.

(3) Primary responsibility for a case passes from Engineering Division to Office of Counsel if a COD must be issued. Counsel prepares the COD based on data provided by Engineering, Construction and Contracting Divisions. The COD must be fully coordinated in accordance with command procedures. Engineering Division remains responsible for monitoring the progress of the case, coordinating support, and reporting.

(4) The 6-year limitation on initiation of a Government claim in FAR 33.206(b) is applicable to A-E liability cases. The 6-year period begins on the date the A-E firm submits its completed work.

n. Settlement. A liability case is closed when final payment is received from the A-E firm or the KO sends a letter to the firm advising that the Government is dropping its claim. The A-E contract file shall be properly documented (FAR 36.608) upon settlement of a liability case to show the amount received and how the funds were dispersed. If the amount of the settlement is less than the amount of the assessed damages, the rationale for accepting the reduced amount must be documented. Appendix DD discusses settlement options and the disposition of the monies received in settlements.

7-8. A-E Performance Evaluation and Contract Closeout.

a. Liability arising during design is reflected on the A-E performance evaluation prepared after completion of design. Similarly, liability related to construction is reflected on the A-E construction performance evaluation. A revised evaluation will be submitted if a liability case is settled after the final performance evaluation has been prepared.

b. It may be convenient for Engineering Division to combine the review of the construction A-E performance evaluation with the "wrap-up" review of the A-E firm's design deficiencies after completion of construction. The AE/RE should be contacted to find out whether there are construction problems attributable to design deficiencies that have not been corrected by construction changes.

c. An A-E contract shall not be closed out until the firm's performance has been evaluated and all liability actions have been resolved. However, closeout of an A-E contract or a construction contract based on an A-E firm's design does not affect the Government's right to pursue the recovery of damages resulting from performance deficiencies which later become apparent (see paragraph 7-7.m(4)).

7-9. Reporting.

a. Customer. Customers and partners will be regularly apprised of the status of A-E liability actions on their projects.

b. District Reports.

(1) Quarterly. Districts will submit a quarterly report to their MSC (with a copy to Project Management, Construction, Contracting, Counsel and other concerned offices) on the status of all A-E liability cases within 30 days after the end of each fiscal quarter. The report will be prepared on ENG Form 4858A-R, Quarterly A-E Liability Case Report (Appendix EE). All settlements will be reported, no matter how they were reached. If there are no pending A-E liability cases, a letter or electronic message stating this fact will be submitted in lieu of this report.

(2) Annual. USACE operating commands will submit an annual report to their MSC on the status of their AERMP by 31 October. The report will be prepared on ENG Form 4858-R, Annual A-E Responsibility Management Program Report (Appendix EE).

c. MSC Reports. MSCs will submit an annual report to HQUSACE, ATTN: CEMP-EC, by 30 November, consisting of:

(1) A brief cover memorandum summarizing the status and effectiveness of their AERMP.

(2) The annual ENG Form 4858-R for each subordinate command.